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No. 90-172

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

JACK ROBINETTE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT, JACK ROBINETTE, IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Department of Labor's rebuttal provision at 20 C.F.R. Section 727.203(b)(3) violates the "not ... more restrictive" mandate of Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. Section 902(f)(2), when applied to miners who meet the invocation requirements of the Department of Health, Education and Welfare's interim presumption at 20 C.F.R. Section 410.490.

2. Whether the guarantee of due process in the Fifth Amendment to the United States Constitution prevents Congress from limiting the methods by which the Director, Office of Workers' Compensation Programs, can rebut the interim presumption at 20 C.F.R. Section 410.490.

3. Whether the Benefits Review Board can sua sponte reverse a finding of an administrative law judge that the Director, Office of Workers' Compensation Programs, has not established rebuttal of the interim presumption pursuant to 20 C.F.R. Section 727.203(b)(3) after the Director has stipulated on the record before the administrative law judge that rebuttal pursuant to Subsection (b)(3) cannot be established.

4. Whether a finding that a claimant/miner is not totally disabled by his pulmonary impairment establishes rebuttal of the interim presumption pursuant to Section 727.203(b)(3).

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STATEMENT OF THE CASE

A. Introduction.

This case arises from the 1973 application of Jack Robinette, a coal miner

for thirty years, for disability benefits under the Black Lung Benefits Act of 1972 (The Act). The petitioner, the Director, Office of Workers' Compensation Programs (Director), asks this Court to review the decision of the Fourth Circuit remanding the case for payment of disability benefits. Specifically, the Director asks this Court to review the Fourth Circuit's decision that the Department of Labor's (DOL) regulation at 20 C.F.R. Section 727.203(b)(3) is invalid because it conflicts with the Congressional mandate in Section 402(f)(2) of the Act [30 U.S.C. 902 (f)(2)] as amended in 1977 by the Black Lung Benefits Reform Act.

Section 727.203(b)(3) [hereinafter (b)(3) rebuttal] is one of the four methods provided by the DOL regulations for rebutting the interim presumption in

Section 727.203(a). The interim presumption presumes a miner is totally disabled due to pneumoconiosis arising out of coal mine employment. If the presumption is unrebutted, the miner is entitled to disability benefits.

It is not disputed that the interim presumption was properly invoked by the Administrative Law Judge (Judge) in Robinette's behalf and that Robinette is entitled to benefits if the presumption is unrebutted.

The Benefits Review Board (BRB or Board) denied the claim holding sua sponte that (b)(3) rebuttal was established, thereby reversing the Judge's finding that (b)(3) rebuttal was not established. The Fourth Circuit reversed holding (b)(3) rebuttal to be invalid because it conflicts with Section 402(f)(2) of the Act. Since

(b)(3) rebuttal was the only means by which the BRB held rebuttal to be established, the Fourth Circuit remanded for payment of benefits.

The Director filed a petition for a writ of certiorari with this Court. Robinette opposes the petition on the grounds that whether or not (b)(3) rebuttal is valid will not affect the outcome of this case. Even if DOL's method for establishing rebuttal in Subsection (b)(3) is held to be valid, the Fourth Circuit's decision remanding the case for payment of benefits will have to be sustained on other grounds.

The Fourth Circuit's decision will have to be sustained because (b)(3) rebuttal was not established. It was not established for two reasons. First, the Director stipulated on the record at the

hearing that (b)(3) rebuttal could not be established. When the BRB found that (b)(3) rebuttal was established, the Board overlooked the stipulation. The stipulation was not pointed out to the Board because (b)(3) rebuttal was not an issue before the Board. The Board's decision that (b)(3) rebuttal was established was sua sponte.

Second, the Judge's conclusion that (b)(3) rebuttal was not established is supported by substantial evidence. Even though the Judge's decision states that (b)(3) rebuttal is not an issue, the Judge, nevertheless, reviewed the evidence and found (b)(3) rebuttal not to be established. When the BRB reversed the Judge's finding as to (b)(3) rebuttal, the Board applied an erroneous legal standard, which has been discredited by the Fourth

Circuit and every other circuit that has considered the question.

Jack Robinette applied for benefits in 1973. His case has been pending for seventeen years. His claim for benefits is established regardless of the outcome of the question raised by the petitioner. In fairness to Robinette, in order to avoid further delay and to promote judicial efficiency, the petition for a writ of certiorari should be denied.

B. This Case.

In 1973 Jack Robinette filed a claim for disability income benefits under the Black Lung Benefits Act of 1972. After HEW denied the application it was referred to the Department of Labor who, pursuant to 30 U.S.C. Section 945(a)(3)(A), properly treated it as if it had been filed with the Department of Labor. The Department

of Labor denied the application and Jack Robinette requested a hearing before an administrative law judge.

A hearing was held on July 10, 1985 before an administrative law judge. At hearing, counsel for the Director stipulated that Robinette had worked thirty years in coal mine employment and that he had pneumoconiosis. See transcript of hearing in App., infra., 7a-8a, 12a.

It should be noted that on page 7a, where the Judge refers to the standard form indicating the issues, he is referring to the Deputy Commissioner's form listing the possible issues in black lung litigation. Any party opposing entitlement is required to inform the Deputy Commissioner which issues he contests by checking those issues on the Deputy Commissioner's form. See C.F.R. 725.463(c). Since pneumoconiosis

was not checked, it means the Director waived his right to contest the existence of pneumoconiosis. See Thornton v. Director, 8 BLR 1-277 (1985). The Director never contested the existence of pneumoconiosis either on the list of contested issues, at hearing, or at any level of appeal.

The interim presumption is invoked pursuant to Section 727.203(a)(1) if a miner has ten or more years of coal mine employment and pneumoconiosis. The Director, therefore, stipulated to the invocation of the interim presumption when he stipulated to thirty years of coal mine employment and the existence of pneumoconiosis.

The Director further stipulated that "causation" was not an issue. App., infra., 7-8a, 14a, 17a. "Causation" is

the issue in the method for establishing (b)(3) rebuttal. Rebuttal is established pursuant to Subsection (b)(3) if the evidence establishes that the miner's total disability does not arise in whole or in part from coal mine employment.

The language in Subsection (b)(3) states that rebuttal is established if:

> "(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment." 20 CFR 727.203(b)(3)

Rebuttal pursuant to (b)(3) is often referred to as the "causation" issue.

It should be noted that even though the miner's pneumoconiosis is not in and of itself totally disabling that will not establish rebuttal. To establish (b)(3)

rebuttal, coal worker's pneumoconiosis must be ruled out as even a partial cause of the miner's disability. See Bethlehem Mines Corporation v. Massey, 736 F.2d 120 (4th Circuit 1984).

The Director further stipulated that the only rebuttal issue he was raising was the issue of "total disability," which is the issue in the method provided for establishing rebuttal pursuant to Section 727.203(b)(2) [hereinafter (b)(2) rebuttal]. App., infra., 7a-8a, 14a, 17a, 20a.

"Total disability" is defined in 20 C.F.R. Section 725.101(a)(21) referencing Section 718.204(b)(1) and (2) as the inability to perform the miner's usual coal mine work or comparable work. Rebuttal pursuant to (b)(2) is established if the miner is able to do his usual coal

mine work or comparable work, which is the definition of being totally disabled. Rebuttal pursuant to (b)(2) is often referred to as the issue of "total disability."

The record was held open for forty-four days for the post-hearing development of evidence. App., infra., 9a-11a. A medical report from Dr. Pathon Thavradhara, known as Dr. Pathon, was admitted into evidence post-hearing as Director's Exhibit 52. Pet. App., 17a. Both parties were given the opportunity to respond to Dr. Pathon's report. App., infra, 10a. Neither did so.

Because it was established that Jack Robinette had more than ten years of coal mine employment and that he had pneumoconiosis, the Judge found him entitled to the interim presumption that

he is totally disabled due to pneumoconiosis arising out of coal mine employment. Pet. App., 18a-19a.

In his decision, the Judge states, "The only issue presented for decision is whether the claimant is totally disabled." Pet. App., 17a. The Judge found, however, that the Director had established rebuttal pursuant to Subsection 727.203(b)(2) because the evidence established that Robinette's pulmonary impairment was not totally disabling. Pet. App., 21a-22a.

Even though the Director conceded that the only issue was total disability and even though the Judge's decision states that the only issue is disability, the Judge nevertheless reviewed the evidence as to the other three methods by which rebuttal can be established pursuant to Sections 727.203(b)(1), (b)(3) and

(b)(4). The Judge found that the evidence did not support rebuttal under any of the other methods of establishing rebuttal. Pet. App., 20a-23a. Since, however, rebuttal was established pursuant to Subsection (b)(2), the claim was denied.

Jack Robinette appealed to the Benefits Review Board (BRB). No cross appeal was filed. The BRB issued its decision and order on September 22, 1982. Pet. App., 8a-12a.

The BRB reversed the Judge's finding that (b)(2) rebuttal was established, citing Sykes v. Director, OWCP, 812 F.2d 890, 10 BLR (4th Circuit, 1985). The Board found, based on the standard for (b)(2) rebuttal set forth in Sykes v. Director OWCP, that (b)(2) rebuttal was not established. The Judge had found (b)(2) rebuttal established because he

found that Robinette was not totally disabled by his pulmonary impairment alone. The BRB reversed because Sykes v. Director, OWCP held that to establish (b)(2) rebuttal the evidence must show that the miner is not disabled considering all of his disabilities. The Director has never challenged the BRB's finding that (b)(2) rebuttal was not established.

Even though the Judge had found that rebuttal was not established by any method except the one provided by Subsection (b)(2), the BRB did not grant the claim. Instead, the BRB reversed, sua sponte, the Judge's finding that rebuttal under Section 727.203(b)(3) was not established. The BRB held that even though the Judge had applied an incorrect legal standard to (b)(2) rebuttal, the findings of fact relied upon by the Judge to establish

(b)(2) rebuttal would establish (b)(3) rebuttal.

The BRB reversed the finding that (b)(3) rebuttal was not established even though it was not an issue before the Board. The Director had not raised the issue on appeal and the Director had stipulated at the hearing that "causality" [(b)(3) rebuttal] was not an issue and "total disability" [(b)(2) rebuttal] was the only issue.

Since the BRB found that rebuttal was established pursuant to (b)(3) it held that the Judge's reliance on (b)(2) rebuttal was harmless. The BRB, therefore, held that the claim was not established because the interim presumption was rebutted.

Having found that Jack Robinette was not entitled to disability benefits under

the DOL's interim presumption, the BRB remanded the case for consideration of entitlement under HEW's interim presumption at Section 410.490. The Director moved the BRB to reconsider its order of remand. On June 23, 1988, the BRB withdrew its order to remand and affirmed the denial of the claim for disability income benefits, holding Section 410.490 inapplicable to claims reviewed by the DOL.

Robinette then appealed the BRB's decisions to the Fourth Circuit. In an unpublished decision, the court of appeals reversed the BRB and remanded for payment of benefits. Pet. App., 1a-7a. Relying on its previous decisions in Taylor v. Clinchfield Coal Company, 895 F.2d 178 (4th Circuit, 1990), petition for cert. pending, No. 90-113 (filed July 17, 1990),

and Dayton v. Consolidation Coal Company, 895 F.2d 174 (4th Circuit, 1990), petition for cert. pending, No. 90-114 (filed July 17, 1990), the court held that (b)(3) rebuttal in the DOL's interim presumption was an additional means of rebuttal not found in the HEW's rebuttal provisions in Section 410.490. The court concluded, therefore, that DOL's Section 727.203(b)(3) violated Section 402(f)(2) of the Act which prohibits the use of more restrictive criteria in the DOL's interim provision than existed in the HEW's interim provision at Section 410.490. The case was remanded to the BRB with instructions to award benefits.

The petitioner asks this Court to review the Fourth Circuit's decision that (b)(3) rebuttal is invalid. The petitioner raises one of the issues left

unresolved by Pittston Coal Group v. Sebben, 109 S.Ct. 414 (1988). Sebben was concerned with the effect of Section 402(f)(2) of the DOL's interim presumption at 20 C.F.R. Section 707.203(a).

The Sebben case compared the criteria for invoking the interim presumption under DOL's regulations with the Department of Health, Education and Welfare's (HEW) criteria for invoking the interim presumption. If invoked under either HEW's or DOL's regulations, the interim presumption presumes that the miner is totally disabled due to pneumoconiosis arising from his coal mine employment. All the elements of entitlement are, therefore, established and the miner is entitled to benefits unless the presumption is rebutted.

In Sebben this Court held that DOL's criteria for invoking the interim presumption is more restrictive than HEW's. Under DOL's criteria one of the methods for invoking the rebuttable interim presumption in Section 727.203(a) is by establishing that the miner has pneumoconiosis and ten years of coal mine employment.

HEW's regulations at 410.490(b) provide an identical method of invoking the rebuttable presumption, except it provides an alternative for the miner who has less than ten years of coal mine employment. If the miner does not have ten years of coal mine employment, he can still invoke the presumption pursuant to Section 410.490(b)(2) by establishing that his pneumoconiosis arose from coal mine employment. Under HEW's regulations the

miner does not need ten years of coal mine employment to invoke the presumption, if he can prove that his pneumoconiosis arose from his coal mine employment.

Since DOL's regulation provides no means for establishing the interim presumption without proving ten years of coal mine employment, this Court held in Sebben that DOL's criteria for invoking the presumption was more restrictive than HEW's.

This Court concluded, therefore, that DOL's interim presumption is invalid in so far as it does not permit miners with pneumoconiosis arising from their coal mine employment to invoke the interim presumption unless they have ten years of coal mine employment. This part of DOL's interim presumption is invalid because it violates the Congressional mandate in

Section 402(f)(2) of the Act that DOL promulgate new interim regulations which would apply criteria that would be no more restrictive than the HEW interim standards in Section 410.490.

Specifically left open in Sebben was the question of whether some of the methods provided by DOL's regulation at Section 727.203(b) for rebutting the interim presumption are invalid because there is no equivalent method of rebuttal in HEW's criteria for rebuttal in Section 410.490. Since DOL's interim criteria for rebuttal permits more methods for establishing rebuttal than HEW's Section 410.490, are they invalid because they make DOL's criteria for entitlement more restrictive than Section 410.490?

This case arises from the ruling of the Fourth Circuit that the method of

establishing rebuttal provided by DOL at 20 C.F.R. 727.203(b)(3) [(b)(3) rebuttal] is invalid because there is no equivalent to (b)(3) rebuttal in HEW's Section 410.490. Since DOL's (b)(3) rebuttal provides a more restrictive criteria for entitlement than HEW's Section 410.490, the Fourth Circuit concluded that (b)(3) rebuttal violates Section 402(f) of the Act.

Subsection (b)(3) provides that the party opposing entitlement can rebut DOL's interim presumption by establishing that the coal worker's pneumoconiosis from which the miner suffers is not a causal factor in the miner's disability. There is no equivalent of (b)(3) rebuttal in HEW's methods of rebuttal in Section 410.490.

Under Section 410.490 once the interim presumption is invoked, it can be rebutted pursuant to Subsection (c) only by showing that the miner is doing his coal mine work or is capable of doing his coal mine work. There is no means in Section 410.490 for rebutting the presumption by ruling out the miner's pneumoconiosis as a cause of the miner's disability.

The explanation of why nothing similar to (b)(3) rebuttal was provided in HEW's regulations is found in Section 410.490(a). Section 410.490 was HEW's response to Congressional concern that the techniques and resources for the diagnosis and evaluation of pneumoconiosis were limited.

Once a miner establishes he has pneumoconiosis, either by clinical

diagnosis or by invoking the presumption, HEW believed that, given the limited medical techniques and resources available, it was not possible to rule out pneumoconiosis as a factor in the miner's disability. The language in Section 410.490(a) specifically states that a pulmonary impairment cannot be ruled out by ventilatory studies alone and refers to the Congressional perception that it is not feasible to perform extensive pulmonary testing to rule out all types of pulmonary impairment. (In Robinette's case no exercise blood gas study was ever performed.) Section 410.490(a) also refers to the Congressional perception that coal worker's pneumoconiosis cannot be ruled out by chest x-rays alone.

Since DOL's (b)(3) rebuttal is a "more restrictive" criteria for granting

disability benefits than that provided for rebuttal by HEW in Section 410.490, the Fourth Circuit held that (b)(3) rebuttal is invalid. This is the question which the petitioner asks this Court to review.

Respondent Robinette, however, contends that it is not necessary to reach the issue raised by the petitioner. It is not necessary to decide whether (b)(3) rebuttal is valid because (b)(3) rebuttal was not established.

Rebuttal pursuant to Subsection (b)(3) was not established for two reasons. First the Director stipulated on the record at hearing that (b)(3) rebuttal could not be established.

Second, even though the Judge found that (b)(3) rebuttal was not an issue, he nevertheless reviewed the evidence and found that (b)(3) rebuttal was not

established. Even if the stipulation is ignored, the Judge's decision based on the medical evidence is supported by substantial evidence.

REASONS FOR DENYING THE PETITION

Jack Robinette opposes the pending petition for certiorari by the Director, because the issue raised by petitioner would not change the resolution of this case. Even if the petitioner were to prevail on the issue he raises, the decision of the Fourth Circuit would be affirmed on other grounds.

The petitioner contends that the United States Court of Appeals for the Fourth Circuit incorrectly held that the method of establishing rebuttal provided at 20 C.F.R. Section 727.203(b)(3) is invalid because it violates the not more restrictive mandate of Section 402(f)(2)

of the Reform Act. It is not necessary, however, to reach this issue because (b)(3) rebuttal was not established.

Rebuttal under Subsection (b)(3) was not established for two reasons. First, the Director stipulated on the record at the hearing before the Judge that rebuttal pursuant to Subsection (b)(3) was not an issue and that the only issue was whether rebuttal pursuant to Subsection (b)(2) could be established.

Second, even though the Judge's decision stated that (b)(2) rebuttal was the only issue, which is what the Director stipulated to at the hearing, the Judge nevertheless reviewed the evidence and found that it did not establish (b)(3) rebuttal. Even ignoring the Director's stipulation, the Judge's decision on (b)(3) rebuttal is supported by

substantial evidence. When the BRB reversed the Judge's findings on (b)(3) rebuttal, it not only ignored the Director's stipulation, it also applied the wrong legal standard to (b)(3) rebuttal.

The fact that (b)(3) rebuttal was not established for these two reasons was raised by Robinette in the Fourth Circuit. The Fourth Circuit chose, however, to decide this case solely on the legal conclusion that (b)(3) rebuttal is invalid because it violates the Congressional mandate in Section 402 of the Act. See Robinette's brief in the Fourth Circuit in Appendix B pp. 41a-48a, where Robinette raised the fact that the Director stipulated that (b)(3) rebuttal was not an issue. See also Robinette's reply brief in the Fourth Circuit in

Appendix C pp. 70a-77a, where Robinette raised the fact that the Judge's decision that (b)(3) was not established was supported by substantial evidence.

The issue raised by petitioner is important but it would not affect the outcome of this case. Even if this Court were to reverse the Fourth Circuit's legal conclusion that (b)(3) rebuttal is invalid, it should still affirm the Fourth Circuit's award of benefits on the grounds that (b)(3) rebuttal was not established.

First, (b)(3) rebuttal was not established simply because the Director stipulated that it was not established. When the BRB reviewed the Judge's finding that (b)(3) rebuttal was not established, it ignored the fact that the Director had stipulated several times on the record at the hearing that (b)(3) rebuttal could not

be established and the only issue was (b)(2) rebuttal.

This stipulation was not pointed out to the BRB in the briefs to the BRB because the Judge's finding that (b)(3) rebuttal was not established was not raised on appeal to the BRB. The BRB's reversal of the Judge's finding as to (b)(3) rebuttal was sua sponte.

Counsel for the Director stated several times on the record that "causality", which is the (b)(3) rebuttal issue, was not contested and that the only issue was "total disability," which is the (b)(2) rebuttal issue.

At the beginning of the hearing, the Director's counsel stated that the only issue was total disability. After a discussion of the issues, the following exchange took place between the Judge and

attorney Mark Malecki, counsel for the Director:

> JUDGE BUTLER: Okay. Then the only issue at hand is the question of total disability? (emphasis added)
>
> MR. MALECKI: Yes, Your Honor.

Later counsel for the claimant asked for a clarification. The following exchange took place between Sunya Anderson, counsel for Jack Robinette; the Judge; and counsel for the Director:

> MS. ANDERSON: Could I ask for a clarification on the record? I'm sorry. This isn't exactly in order.
>
> JUDGE BUTLER: Yes.
>
> MS. ANDERSON: I was sort of surprised this morning

causation was not in issue (emphasis added) and total disability is, only.

MR. MALECKI: Well, that it what is checked on the controversion sheet.

MS. ANDERSON: Okay.

MR. MALECKI: I could raise it but I don't think I am going to.

MS. ANDERSON: Okay.

(Pause.)

JUDGE BUTLER: Well, then we are agreed we are proceeding solely on the issue of total disability? (emphasis added)

MR. MALECKI: Yes, Your Honor.

App., infra., 14a.

The stipulation was clear that "causation" or (b)(3) rebuttal was not an issue and the only issue was "total disability" or (b)(2) rebuttal. Jack Robinette was entitled to rely on that stipulation.

Since the record was held open for the post-hearing receipt of evidence, Robinette had the opportunity to submit additional evidence and did not. Had he known that (b)(3) rebuttal was an issue, he could have submitted additional evidence on that issue.

Upon the motion of the Director, the record was held open for thirty days for receipt of a report by Dr. Pathon Thavradhara, known as Dr. Pathon. App., infra., 9a-10a. The report was received from the Director post-hearing and admitted as Director's Exhibit 52. Pet.

App., 17a. After the receipt of Dr. Pathon's (Thavradhara's) report, both parties were given fourteen days, or longer if they needed, to respond to Dr. Pathon's report. App., infra., 10a-11a. Neither party submitted a response. If Robinette had known that (b)(3) rebuttal was an issue, he might have submitted post-hearing evidence.

The BRB's ignoring of the Director's stipulation that (b)(3) rebuttal was not established, was undoubtedly a factual mistake. Had the BRB noted the stipulation, its own case law would have required it to find that (b)(3) rebuttal was not established.

The BRB has held that if the opposing party stipulates to a fact or issue at the hearing, then the claimant is relieved of any burden of proving it. Cooley v.

Alabama By Products Corporation, 5 BLR 819 (1983), footnote 4 at 5 BLR 819; and Backert v. Director, 6 BLR 1-640 (1983).

The BRB cannot reverse a finding of fact stipulated by the parties at hearing. By the BRB's own case law, Jack Robinette was relived of any burden he may have had, if any, to submit evidence pertaining to (b)(3) rebuttal.

Assuming arguendo that the Director had not stipulated that (b)(3) rebuttal was not established, the Judge's finding that (b)(3) rebuttal was not established must still be upheld. Even though the Director stipulated that (b)(3) rebuttal was not an issue, and even though the Judge in his decision stated that the only issue was total disability, the Judge nevertheless reviewed the evidence and

found that it did not support (b)(3) rebuttal. Pet. App., 22a-23a.

The Judge's finding with regard to (b)(3) rebuttal is supported by substantial evidence. A Judge's findings of fact are binding upon the BRB if they are supported by substantial evidence. Kertesz v. Crescent Hills Coal Company, 788 F.2d 158, 162 (3rd Circuit, 1986).

When the BRB reversed the Judge's findings it applied an incorrect legal standard to (b)(3) rebuttal. The BRB held "that the administrative law judge's rebuttal findings as to (b)(2) are affirmable under (b)(3) ..." Pet. App., 10a. The Judge's findings of fact as to (b)(2) rebuttal do not, however, sustain (b)(3) rebuttal.

The Judge found that (b)(2) rebuttal was established because Jack Robinette did

not have a totally disabling lung impairment. The applicable BRB standard at that time was that (b)(2) rebuttal was established if it was shown that the miner's pulmonary impairment alone was not in itself totally disabling. See Sykes v. Itmann Coal Company, 2 BRB 1-1089 (1980).

The BRB states in its decision that it is reversing the Judge's finding as to (b)(2) rebuttal because "subsequent to the issue of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit held in Sykes v. Director, OWCP, (citations omitted) that to establish (b)(2) rebuttal the opposing party must show that the miner is not disabled 'for whatever reason.'" (Pet. App., 9a-10a) Sykes v. Director, OWCP held that to sustain (b)(2) rebuttal all the miner's

disabilities have to be considered, not just his pulmonary disabilities.

The Judge's finding that Robinette's lung impairment was not in itself totally disabling does not sustain (b)(3) rebuttal. To establish (b)(3) rebuttal the party opposing entitlement must rule out pneumoconiosis as causing even part of the miner's total disability. See Bethlehem Mines Corporation v. Massey, supra. A finding that the miner's pulmonary impairment is not in and of itself totally disabling is not the same as a finding that the miner's pulmonary impairment is not even a partial factor in the miner's total disability.

The BRB incorrectly equated the former standard for (b)(2) rebuttal, establishing that the miner's pulmonary impairment was in and of itself totally

disabling, as being the same as the present standard for (b)(3) rebuttal, ruling out that the miner's disability arises even partly from pneumoconiosis. The two are not the same. Just because a pulmonary impairment is not in and of itself totally disabling it can still be a partial cause of the miner's total disability. Total disability is frequently caused by the interplay of several different impairments.

Establishing that the miner is not totally disabled because of his pulmonary impairment does not establish rebuttal under any method provided for establishing rebuttal in Section 727.203(b). It is true that the BRB has held at various times that such a finding would establish either (b)(2) or (b)(3) rebuttal, but the Board has been reversed consistently by

every circuit court that has considered the issue.

In Sykes v. Itmann Coal Company, supra, the BRB maintained that a finding that the miner is not totally disabled from a pulmonary impairment would establish (b)(2) rebuttal. This position has been rejected, however, by every circuit court that considered it[1] because it is contrary to the plain language of Subsection (b)(2). See Sykes v. Director, OWCP, supra; Martin v. Alabama By-Products Corporation, 864 F.2d 1555 (11th Circuit, 1989); York v. Director, OWCP, 819 F.2d 134 (6th Circuit, 1987), Wetherill v.

[1]The Tenth Circuit in Mitchellson v. Director, OWCP, 880 Fed. 265 at 669, stated that it accepted the BRB's interpretation of (b)(2) "for purposes of this case" because it was supported by DOL and the employer and unchallenged by the claimant.

Director, OWCP, 812 F.2d 376, 379 (7th Circuit, 1987); Kertesz v. Crescent Hills Coal Company, 788 F.2d 158, 162 n. 5 (3rd Circuit, 1986); Oravitz v. Director, OWCP, 843 F.2d 740 (Third Circuit, 1988); Ramey v. Kentland Elkhorn Coal Company, 755 F.2d 485, 486 n. 3 (6th Circuit, 1985).

These cases hold that the plain language of (b)(2) rebuttal requires that the party opposing entitlement establish that the miner is able to do his usual coal mine work or comparable and gainful work. Subsection (b)(2) states that rebuttal is established if

> (2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see Section

410.412(a)(1) of this title)...

As the Fourth Circuit states in Sykes v. Director, supra, "Section 727.203(b)(2) is concerned with the question of whether miners are totally disabled for whatever reason" (emphasis added). 812 F.2d at 893-894. A finding that the miner is not disabled due to his pulmonary impairment alone does not, therefore, establish (b)(2) rebuttal because all the miner's impairments have to be considered.

The BRB also once took the position that a finding that the miner was not totally disabled due to a pulmonary impairment would establish (b)(3) rebuttal. See Jones v. The New River Company, 3 BLR 1-199 (1981). This also was rejected by every circuit court that considered it. See Gibas v. Saginaw Mining Company, 748 F.2d 1112, 7 BLR 2-53

(6th Circuit, 1984); Bethlehem Mines Corporation v. Massey, supra,; Alabama By-Products Corporation v. Killingsworth, 733 F.2d 1511, 6 BLR 5-59 (11th Circuit, 1984) and Carozza v. United States Steel Corporation, 727 F.2d 74, 6 BLR 2-15 (3rd Circuit, 1984). As a result the BRB reconsidered its decision in Jones and reversed it in an en banc decision in Borgeson v. Kaiser Steel Corporation, 8 BLR 1-312, 1985.

The holding in these cases is that the party opposing entitlement must rule out pneumoconiosis even as a partial cause of the miner's disability in order to establish (b)(3) rebuttal. Establishing that a miner is not totally disabled by his pulmonary impairment alone does not establish (b)(3) rebuttal because it does not rule out pneumoconiosis as a

contributing cause to the miner's total disability.

In the instant case the BRB concluded that the Judge's factual finding as to (b)(2) rebuttal would not sustain (b)(2) rebuttal after Sykes v. Director, OWCP but it would sustain (b)(3) rebuttal. This is incorrect. A finding that a miner is not totally disabled due to a pulmonary impairment does not sustain either (b)(2) or (b)(3) rebuttal. The Board applied an incorrect standard to (b)(3) rebuttal when it reversed the Judge's finding that (b)(3) rebuttal was not established.

Since (b)(3) rebuttal was never established, it is not necessary to reach the issue of whether or not Subsection (b)(3) is valid.

Rebuttal was not established pursuant to Subsection (b)(3) for two reasons.

First, because the Director stipulated it was not established. Second, there is substantial evidence to support the Judge's finding that, based on the evidence, (b)(3) rebuttal was not established.

The Fourth Circuit decided the case solely on the legal conclusion that (b)(3) rebuttal was invalid. The fact that (b)(3) rebuttal was not established because of the Director's stipulation and the Judge's finding, based on the evidence, is not, however, a new issue. Both of these points were raised by Robinette in the Fourth Circuit. App., infra., 41a-49a and 70a-79a.

It is conceded that the issue raised in the Director's petition to this Court is important. The same question is raised by petitions for certiorari pending in

four other cases: Pauley V. Bethenergy Mines, Inc., No. 89-1714, Peabody Coal Company v. Taylor, No. 89-1696; Clinchfield Coal Company v. Taylor, No. 90-113, and Consolidation Coal Company v. Dayton, No. 90-114.

The petition in this case, however, should not be granted because the legal issue presented would not change the outcome of this case. Even if it were held that DOL's method of establishing rebuttal provided in Subsection (b)(3) is valid, it makes not difference in this case because (b)(3) rebuttal was not established. The decision of the Fourth Circuit remanding the claim for payment of benefits would, therefore, have to be reversed on other grounds.

CONSIDERATIONS FOR GRANTING PLENARY REVIEW

The petition for a writ of certiorari should be denied. If it is granted, then this case is a good candidate for plenary review.

The Solicitor General has suggested that Robinette not be granted plenary review. Pet. Brief 6-7. The Solicitor General suggests that either Pauley v. Bethenergy Mines, supra or Consolidation Coal v. Dayton, supra be accepted for plenary review and Robinette be disposed of in light of the decision in Pauley or Dayton. Pet. Brief 7.

It is the position of Robinette that Pauley be given plenary review or, if not Pauley, then either Robinette or Peabody v. Taylor, supra should be given plenary review. In Pauley, Robinette and

Peabody/Taylor, three of the five cases where petitions for certiorari are pending, the interim presumption was invoked by x-ray diagnosis of pneumoconiosis. One of the x-ray cases should be granted plenary review because they raise different questions than the others and because most of the petitions before the Court are x-ray cases.

If the interim presumption is invoked by chest x-ray under Section 410.490, a means of rebuttal may exist that does not exist in the other cases. Rebuttal pursuant to 410.490(c)(1) showing that the miner is doing his coal mine work or (c)(2) showing the miner is capable of doing his coal mine work is available regardless of the method of invocation. An additional means of rebuttal may be

available, however, if invocation occurs by positive chest x-rays.

If the miner invokes, by chest x-ray, pursuant to (b)(1)(i) he is required by 410.490(b)(2) to show that his pneumoconiosis arose from coal mine employment. If he has ten years of coal mine employment, he is entitled to a presumption that his pneumoconiosis arose out of coal mine employment. The presumption that the ten year miner's pneumoconiosis arose from coal mine employment is provided by the references to Section 410.416 and 410.456 in Section 410.490(b)(2).

This presumption is, however, rebuttable. Sections 410.416 and 410.456 state that if the miner suffering from pneumoconiosis has ten years of coal mine employment, "it will be presumed, in the

absence of persuasive evidence to the contrary, that pneumoconiosis arose out of such employment" (emphasis added). This is an additional means of rebuttal not provided in Section 410.490(c)(1) and (c)(2).

If invocation occurs by ventilatory studies and fifteen years of coal mine employment pursuant to Section 410.490(b)(1)(ii), the presumption that the miner's pneumoconiosis arose from coal mine employment arises from Section 410.490(b)(3). Section 410.490(b)(3) states on its face that it does not apply if invocation occurred by positive chest x-rays pursuant to Section (b)(1)(i). No rebuttal of the presumption that pneumoconiosis arose from coal mine employment is provided in Section

410.490(b)(3). Rebuttal is limited to that provided at 410.490(c)(1) and (c)(2).

Since the cases where invocation occurred by chest x-rays may allow an additional means of rebuttal, one of those cases should be taken for plenary review in order that all the rebuttal possibilities can be explored and decided. Either Pauley, Robinette or Peabody/Taylor should be granted plenary review.

In considering which case or cases to accept for plenary review, it should be noted that Robinette raises a question of constitutional law not raised in the other cases. In each of the other cases, the coal operator opposing entitlement has raised the issue as to whether Congress' limiting of the methods of rebuttal available violate their constitutional guarantee of due process of law. The due

process question is also raised by the Director's petition in Robinette where the petitioner lists the "Questions Presented." The due process question presented in Robinette is different, however, from the other cases.

There is no coal operator opposing entitlement in Robinette. The only party opposing entitlement in Robinette is the Director. It is doubtful that the Director has any constitutional due process rights which the Director can assert against Congressional legislation. If Section 402(f)(2) of the Act violates the constitutional due process rights of the various coal operators opposing entitlement in the other cases, it does not follow that the Director's constitutional due process rights have been violated. Possibly plenary review

should be granted in both Pauley, which has a coal operator opposing entitlement, and Robinette in order that the constitutional question in each factual situation can be fully resolved.

CONCLUSION

Regardless of the outcome of the question the petitioner presents for review, the decision of the Fourth Circuit will be sustained on other grounds. Since Robinette's application for disability benefits is seventeen years old, the resolution of his case should not be needlessly delayed. The petition for writ of certiorari should be denied.

If a writ of certiorari is granted, then plenary review should be granted in Pauley or one of the other x-ray cases, Robinette or Peabody/Taylor, in order that

the unique questions in x-ray cases can be resolved.

If a writ of certiorari is granted in Robinetts, it should be granted plenary review in order that the constitutional due process questions can be resolved in fact situations where entitlement is opposed only by the Director.

Respectfully submitted,

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